Supreme Court, U.S.
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No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,

Petitioners,

—v.—

EVELYN COKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY MEMORANDUM

Contrary to Respondent's suggestion, this case does not involve the "unwillingness" of elderly and disabled people "to pay more" for home health care services. (Brief in Opp. at 5). Nor do the ramifications of the Second Circuit's holding boil down to Respondent's simplistic characterization—*i.e.*, that the invalidation of 29 C.F.R. § 552.109(a) ("§ 552.109(a)") just makes it "more expensive for employers of unskilled workers providing a range of domestic and personal services to elderly and disabled people in their homes to comply with the minimum labor standards Congress established in the FLSA." (Brief in Opp. at 2). Rather, the decision below threatens a sizeable, frail, and vulnerable population that is financially *unable* "to pay more" for homecare and nullifies the Department of Labor's regulatory effort to make these crucial services available to those in need within the constraints of fairness and limited public funding.

In 1974, Congress specifically authorized the Secretary of Labor to take such measures by exempting from federal minimum wage and overtime pay requirements "*any* employee . . . employed in domestic service employment to provide companionship services" to the aged and infirm. 29 U.S.C. § 213(a)(15) (emphasis added). Following its initial promulgation in 1975 by notice-and-comment rulemaking, and having been reconsidered by the Department of Labor as recently as 2002, § 552.109(a) has guided the home health sector for more than thirty years. Nevertheless, without any factual support, and based only upon its own speculation on policy matters, the court of appeals mistakenly cast aside this time-tested regulation. In so doing, the Second Circuit has jeopardized the health care and livelihoods of scores of thousands of people in this geographic region, and possibly many more elsewhere. Given its dangerous and

broad-scale implications, this Court should review the Second Circuit's ruling.

Respondent opposes *certiorari* by systematically distorting the issues presented in this case for consideration. For example, Respondent erroneously suggests that the Medicaid program will readily absorb the staggering increase in costs imposed on governmental, non-profit, and private agencies by the invalidation of § 552.109(a). (Brief in Opp. at 6-7). Although this assertion is plainly wrong,[1] Petitioners must await the opportunity for merits briefing in order to refute it. Petitioners must likewise wait to correct many of Respondent's numerous other inaccurate statements.

But Respondent's Brief in Opposition makes two new problematic claims that warrant correction now. To start, Respondent tries to dismiss the severity of the Second Circuit's decision by attacking—for the first time—the reliability of sworn statements submitted by several home health care experts and the City of New York in support of Petitioners' motion to stay the Second Circuit's mandate. (Brief in Opp. at 3). In opposing that motion, Respondent submitted *no* evidence to the court of appeals challenging these declarations, although she had the opportunity to do so. Furthermore, the court of appeals must have found these submissions both credible and persuasive, given that the court *granted* Petitioners' motion to stay the mandate over Respondent's objection. (33a-35a).

Even more troubling, though, is Respondent's misleading suggestion that the Department of Labor has,

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[1] *See, e.g.*, Brief of National Association for Home Care & Hospice, Inc., as *Amicus Curiae* in Support of Petition for Writ of Certiorari, Dkt. No. 04-1315 (April 29, 2005), at 2-4 (discussing inability of Medicare and Medicaid programs to compensate for costs imposed on home health care sector by invalidation of § 552.109(a)).

itself, concluded that withdrawing § 552.109(a) would not have a significant economic impact on affected parties. (Brief in Opp. at 3 n.1). For this proposition, Respondent relies on a preliminary statement issued by the Department of Labor at the outset of a notice-and-comment rulemaking process, commenced in January 2001, in order to determine whether the agency should amend § 552.109(a). But Respondent notably omits the explanation that the agency provided when it *abandoned* the proposed amendment in April 2002. After evaluating the rulemaking record, the Department of Labor reported that "numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact" from retracting the regulation. 67 Fed. Reg. 16,688 (April 8, 2002). Hence, the agency's most recent statements support rather than undermine Petitioners' concern that the loss of § 552.109(a) will have profound, adverse consequences for the home health care community.[2]

Respondent also argues that that second question presented in the *certiorari* petition—whether the court of

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[2] Moreover, it is unlikely that the City of New York, all 62 counties comprising the State of New York, and numerous regional and national associations of governmental, non-profit, and private home health care providers would so strongly urge this Court to grant *certiorari* if the consequences of the Second Circuit's ruling were truly insignificant. *See* Brief of *Amici Curiae* City of New York and New York State Association of Counties in Support of Petition for a Writ of Certiorari, Dkt. No. 04-1315 (Aril 29, 2005); Brief of National Association for Home Care & Hospice, Inc. as *Amicus Curiae* in Support of Petition for Writ of Certiorari, Dkt. No. 04-1315 (April 29, 2005); Brief of *Amicus Curiae* Home Care Association of New York State, Inc., Dkt. No. 04-1315 (April 29, 2005); Brief of *Amicus Curiae* Continuing Care Leadership Coalition, Inc. in Support of Petitioner, Dkt. No. 04-1315 (April 29, 2005); Brief of *Amicus Curiae* Home Care Council of New York City, Inc. in Support of Petitioners, Dkt. No. 04-1315 (April 29, 2005).

appeals incorrectly struck § 552.109(a) under *Skidmore* without ever permitting Petitioners to submit evidence in support of the regulation's persuasiveness—is procedurally improper. (Brief in Opp. at 27). Respondent maintains that this issue should not be considered by the Court because "it was Petitioners who moved for judgment on the pleadings" and because "Petitioners made no attempt to introduce the evidence they now say is necessary despite knowing the validity of the regulation was at issue." (*Id.*). This argument is meritless. It ignores both the procedural posture of the case and the correct parameters of a motion for judgment on the pleadings.

Respondent conceded in the district court that she could not win her case against Petitioners if § 552.109(a) were valid and enforceable. (5a, 53a). Applying *Chevron*, the district court upheld § 552.109(a) and therefore granted Petitioners judgment on the pleadings. (53a). The district court never conducted a *Skidmore* analysis with regard to § 552.109(a), and had no opportunity to consider evidentiary matter outside the pleadings.

Thus, Petitioners were not required to raise a procedural argument on appeal regarding a *Skidmore* claim.[3] Nor did they waive their basic right to present evidence at some later stage in the proceeding simply because they did not assert that right while defending a favorable judgment *on the pleadings*. By definition, a motion for judgment on the pleadings cannot rest on extraneous materials without the trial court first converting the motion into one for summary judgment and then giving

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[3] Respondent repeatedly states that Petitioners did not file a brief in the court of appeals. (Brief in Opp. at 27). These statements are wrong. Petitioners did submit a brief to the Second Circuit, albeit, because of financial constraints, it was a copy of their district court brief.

all parties the chance to submit necessary evidence. *See* Fed. R. Civ. P. 12(c). No such conversion took place here.

Consequently, even assuming that the district court erroneously granted judgment to Petitioners by affording § 552.109(a) *Chevron* deference, Petitioners were still entitled to pursue *Skidmore* deference on remand. By precipitously invalidating § 552.109(a) without permitting the submission of a factual record, however, the court of appeals deprived Petitioners of the opportunity to present "sources of weight" that lend substantial merit to the regulation's validity. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). Respondent's invocation of a waiver theory in order to shield this critical misstep from scrutiny is entirely frivolous.

CONCLUSION

For the reasons stated above, and for the reasons stated in the petition for a writ of certiorari, this Court should grant the petition and review of the judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 9, 2005

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a Fair Labor Standards Act regulation, 29 C.F.R. 552.109(a), issued by the Department of Labor pursuant to delegated rulemaking authority and after notice and comment, was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and was not enforceable.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay a minimum wage and, for work hours that exceed 40 hours in a work week, one and one-half times an employee's regular rate of pay. Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, generally extend those requirements to "domestic service" employees, but specifically exempt such employees providing "companionship services" to the elderly or infirm. That exemption applies to:

> any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to

> care for themselves (as such terms are defined and delimited in the regulations of the Secretary).

29 U.S.C. 213(a)(15). Congress did not define either "domestic service employment" or "companionship services" in the Act, but instead authorized the Secretary of Labor "to prescribe necessary rules, regulations, and orders" regarding the 1974 Amendments. § 29(b), 88 Stat. 76.

Pursuant to that authority, the Department of Labor (DOL) promulgated regulations exempting domestic service employees who provide companionship services from the minimum wage and overtime requirements of the FLSA. 29 C.F.R. Pt. 552. First adopted in February 1975, those regulations make clear that domestic service employees providing companionship services are exempt from the FLSA's minimum-wage and overtime-pay requirements, even when they are employed by a third-party employer. Section 552.109(a) of the regulations provides:

> Employees who are engaged in providing companionship services, as defined in [29 C.F.R.] § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15) [of the FLSA].

29 C.F.R. 552.109(a).[1]

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[1] "Companionship services" are defined, in relevant part, as:

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.

The regulations at issue, including Section 552.109(a), were issued after DOL undertook notice-and-comment rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. Initially, DOL proposed that employees who provide companionship services and are employed by third parties would fall outside the scope of the companionship exemption, on the ground that some third-party employment was covered by the FLSA before the 1974 Amendments. See 39 Fed. Reg. 35,382, 35,385 (1974).

After receiving and considering comments on the proposed rule, however, DOL decided that third-party employment should be included within the scope of the companionship exemption. See 40 Fed. Reg. 7404, 7405 (1975). DOL acknowledged that its decision constituted a change from the proposed rule, but explained that, under the plain language of the FLSA, the "exemptions

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29 C.F.R. 552.6. The regulations also state that "domestic service employment":

> refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. 552.3; see 29 C.F.R. 552.101 ("The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling."). Sections 552.3 and 552.6 are contained in Subpart A of the regulations, designated "General Regulations," whereas Section 552.109(a)'s third-party exemption is contained in Subpart B, designated "Interpretations."

can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. at 7405. Thus, the final regulation promulgated to implement the 1974 Amendments expressly applied the companionship services exemption to third-party employers.

In 1993, DOL proposed to limit the companionship exemption substantially by requiring that the person receiving companionship services be the employer or joint employer of the domestic service employee. See 58 Fed. Reg. 69,310, 69,312 (1993). Seven comments on the proposed change were received by DOL, none of which was supportive of the change. See 60 Fed. Reg. 46,797-46,798 (1995).

In 1995, DOL reopened and extended the comment period for the 1993 proposed rule, and revised its proposal to allow the companionship services exemption for third-party employers to apply only to employment by a government agency or family member acting on behalf of an incapacitated elderly or infirm person. 60 Fed. Reg. at 46,798. Again, DOL received very few comments on the proposal, and in 2001 the agency acknowledged that the comments reflected confusion about the impact and effect of the proposal. See 66 Fed. Reg. 5481, 5485 (2001). Accordingly, the third-party employer exemption was not limited.

In the 2001 Federal Register notice, DOL again proposed to amend the regulations, this time by revising the definition of "companionship services" to clarify the focus on the element of "fellowship" and to eliminate the third-party exemption contained in Section 552.109(a). 66 Fed. Reg. at 5485; see *id.* at 5488. In the notice of

proposed rulemaking, DOL recognized that "[u]nder the existing regulation, employees who are employed by an employer or agency other than the family or household using the companionship services may still qualify for the exemption." *Id.* at 5485. The agency expressed the view that "the current regulations contain an internal inconsistency" that would be resolved by the proposed change, and also stated that the proposed new rule would not have a significant economic impact. *Id.* at 5485-5486. In 2002, however, after the comment period closed, DOL withdrew the proposed rule because numerous commenters, including the Small Business Administration (SBA) and the Department of Health and Human Services (HHS), challenged DOL's conclusion that the rule would have little economic impact. See 67 Fed. Reg. 16,668 (2002). Thus, although DOL has periodically considered alternative constructions, the regulation at 29 C.F.R. 552.109(a) has remained unchanged since 1975.

2. Petitioners employ approximately 40 home health care aides, who provide companionship services to approximately 30 homebound patients in New York. Pet. 8; Pet. App. 37a-38a, 79a. Respondent is a former employee of the petitioners, who worked as a home health care attendant. Pet. App. 37a-38a. Respondent brought suit against petitioners under, *inter alia*, Sections 206 and 207 of the FLSA, alleging that despite working more than 40 hours a week, she never received overtime payments and that her hourly wage was less than the minimum wage. Pet. App. 37a-42a.

The district court granted petitioners' motion for judgment on the pleadings and dismissed the case, holding that respondent could not state a claim as a matter of law because home health care workers are exempt